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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S MOTION TO EXCLUDE EXHIBIT 735 PURSUANT TO ARIZ. R. EVID. 401, 402, AND 403**

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves this Court to exclude the audio exhibit marked 735, containing the recorded statement of Kirby Brown. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Exhibit 735, an audio recording of Kirby Brown reflecting upon experiences she had during seminars and games held several days before the sweat lodge ceremony, is inadmissible under Rules 401, 402, and 403. The recording lacks *any* probative value to the charged crimes of reckless manslaughter or to Mr. Ray's mental state. The State's argument—that Ms. Brown's recall of a challenging experience on October 5 put Mr. Ray on notice that, to follow his supposed "rules," she would choose to remain in the sweat lodge on October 8 notwithstanding life-threatening physical symptoms—is inconceivable. The State's reasoning flies in the face of the rule against propensity evidence, is at odds with the actual content of Ms. Brown's statement, and is simply wrong.

In addition, any probative value would be outweighed by the prejudicial effect of admitting the statement. Ms. Brown's reflection is ambiguous, inflammatory, and potentially misleading, and it cannot now be explored through confrontation. Nor can the problem be cured by a limiting instruction, for the prejudice arises in large part from the purpose the State alleges *is* proper—the supposed connection to Mr. Ray's awareness of his influence on Ms. Brown's behavior—rather than from the truth of the matter asserted.

II. ARGUMENT

A. The recording is irrelevant and must be excluded pursuant to Rules 401 and 402.

Ms. Brown's recorded statement has no probative value to the charged crimes of reckless manslaughter. As an initial matter, the only purpose for which the statement *could* be admissible as non-hearsay pertains to Mr. Ray's mental state. As this Court orally ruled on March 3, the statement would be inadmissible hearsay if offered for any other purpose.

Ms. Brown's statement regarding her experience on October 5—three days before the sweat lodge ceremony began—is *not at all* probative of Mr. Ray's allegedly reckless mental state on October 8. Ms. Brown's statement was part of an open microphone session where participants

reflected on the prior days' events. In the recording, Ms. Brown's complete statement (including the part the State wishes to excerpt) is as follows:

> So, I sang the song 'Rain Rain Go Away Come Again Another Day' and there was the rainbow. That was great. But to this power piece that I brought. I really didn't know why I was bringing this, it was a, it's an old piece that was given to me when I was in third grade and it sat in my jewelry box for so long and it was – it's an old Scottish kilt pin from my grandmother's Scottish kilt. She was a Scottish dancer. And it wasn't because she was so big in my life that I was bringing her with me, but I just brought it anyway because that was one of my pieces that I had to bring. And when we started the game, I was like you, I was like 'I'm going to be the hero'. You know? And then I died. So quickly, just right there! [Laughter]. And before it even began! And then I froze to death! And then I overheated to death and I puked and I swallowed it down underneath that pillow in there.
>
> JAMES ARTHUR RAY Wow.
>
> WOMAN #6[1] … or underneath the blanket and thank God I didn't puke as much as you did, I have a feeling, but I realized that, first of all, being so disciplined, you know that was incredible. Because I was freezing I had to go to the bathroom. I think I was – I puked because I was in so much pain that I had to go the bathroom so badly. But I realized that the debtor with us and our loved ones that have passed are with us. And, so as I laid there dying, underneath the blanket and everybody was working and you know battling, I just kept sending my energy to them and also working on not moving, so I didn't kill one of my fellow people and, and so then I'm out in my beautiful medicine wheel, and I haven't done much meditation. This is really the most I've ever done, just the holo-sync was just this past month, was really the first part. And so, at one point, I needed to meditate and I did. And a powerful figure came to me. Brother Leo Kirby, my grandfather's brother, who was an amazing man and a very powerful priest and he was always my person that I would go to ask for advice. And he appeared, and I've missed him, I've missed him and he hasn't been in my writing or anything. This was nothing in my writing, but he came to me and I just said, 'oh wow, thanks for coming here.' And do you have any advice. And he said, I have three words for you, 'Keep things simple'. And I, I said, that's the same thing he said to me before he died. And I just hugged him and thanked him and of course he was in my higher counsel today, in that meditation which I haven't done before so that was my first, so I didn't even have that going into the meditation and my medicine wheel. So it was very powerful and understanding that, you know, our loved ones that have passed are there with us and we can use them to help and be there.

[1] The recording does not identify Ms. Brown by name. The Defense assumes for purposes of argument that the State can lay foundation to establish that the speaker was Ms. Brown.

Transcript of audio recording of Spiritual Warrior seminar, 10/8/09, at 32:18–34:4.

The State argues that this reflection reveals that Ms. Brown was willing on October 5 to endure some physical discomfort as part of her resolve to follow Mr. Ray's "rules," and thus that she was likely to stay in the sweat lodge to the point of death three days later. The State further posits that Mr. Ray, having been present for Ms. Brown's reflection regarding her prior experiences, knew that Ms. Brown would decline to leave the sweat lodge days later despite life-threatening symptoms in order to follow his supposed "rules." As noted above, this far-fetched theory has at least three failings: (1) it relies on improper propensity reasoning; (2) it is at odds with the evidence; and (3) it is facially wrong.

1. The State cannot rely on Ms. Brown's statement to prove her action in conformity therewith.

Setting aside momentarily the facially wrong nature of the State's reasoning and its conflict with both rational human behavior and actual evidence, the State's argument stumbles at the outset because it demands that this Court honor impermissible propensity inferences. The State's theory only coheres if this Court accepts—and concludes that Mr. Ray also accepted—that Ms. Brown acted on October 8 in conformity with a trait she allegedly displayed on October 5. In other words, the State alleges that because Ms. Brown apparently felt motivated to lay still during a game on October 5, she was likely to ignore life-threatening symptoms in the sweat lodge ceremony three days later. Even assuming these actions were similar, the rules of evidence disfavor such reasoning. *See* Ariz. R. Evid. 404(a) (subject to limited exceptions, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"); Ariz. R. Evid. 404(b); 1 AZ PRAC §404:1 ("[W]ith respect to whether a particular episode occurred, such evidence is of relatively slight probative value compared to the risk of misuse by the jurors."); *see also, e.g., Henson v. Triumph Trucking, Inc.*, 180 Ariz. 305, 306–07, (App. 1994) (evidence of misuse of prescription drugs not admissible to prove similar misuse on night of accident).

2. The State's theory is at odds with the evidence.

Moreover, even if the Court permitted the forbidden propensity inference, the evidence does not support the State's theory. The State wishes to argue that because Ms. Brown was afraid to break Mr. Ray's "rules" in one seminar exercise, she was likely to behave similarly in a later exercise. But Ms. Brown does *not* attribute her experience under the blanket to Mr. Ray or to his rules, as the State argues. Instead, as the quotation above reveals, she describes her actions as part of a desire to honor her loved ones and fellow participants. There is nothing in her commentary that states or suggests any connection to Mr. Ray's rules or to the sweat lodge ceremony.

3. The State's theory is facially wrong.

Even if the propensity inference were permitted, and even if Ms. Brown's commentary suggested *any* connection to the sweat lodge ceremony, the State's theory of human behavior is facially wrong. It is not plausible to suggest that anyone listening to Ms. Brown's reflection would believe that she would choose to stay inside the sweat lodge notwithstanding impending death. A person's decision to be "disciplined" during a team building exercise and to endure some discomfort is not a signal that the same person would subject herself to a substantial risk of death several days later. Were it otherwise, everyone who heard Ms. Brown's statement could also be guilty of reckless manslaughter, for everyone would have been on notice of Ms. Brown's expected behavior.

B. Even if the recording had some probative value, it should be excluded under Rule 403.

1. Ms. Brown's statement is ambiguous, inflammatory, and unfairly prejudicial.

Even where an out-of-court statement is not hearsay, and even where it arguably has some probative value, a court appropriately excludes the testimony under Rule 403 where the statement lacks precision or other indicia of reliability, where it invites the jury to draw "questionable inference[s]," or where it would confuse the jury and waste time. *See, e.g.*, *Mister v. Northeast Illinois Commuter R.R. Corp.*, 571 F.3d 696, 699 (7th Cir. 2009) (statement of party opponent

properly excluded under Rule 403 where it contained layers of hearsay and lacked "precise factual statements"); *United States v. Carneglia*, 256 F.R.D. 366, 374 (E.D.N.Y. 2009) (victim's statements to officer, although not hearsay, were properly excluded; testimony would have invited jury to draw questionable inference that statement was result of threats made by defendant and would have tended to confuse and mislead jury and waste time). Exclusion under Rule 403 is warranted here.

First, the meaning of Ms. Brown's reflection is ambiguous in many respects. It is not clear whether Ms. Brown is speaking literally of vomiting, or is speaking in metaphor, or at least hyperbole; her statement regarding "puking" immediately follows comments that she both "froze to death" and "overheated to death." Her statement also does not explain whether her "puking," if literal, was along the lines of a burp or, by contrast, projectile vomiting, and does not explain how or why a need to use the bathroom would induce this condition. Mr. Ray cannot prevent the jury from assuming the worst—that Ms. Brown was seriously ill because of something that Mr. Ray did— and cannot correct misconceptions through cross-examination.

In addition, the statement will unfairly prejudice Mr. Ray's defense because it is inflammatory. This is not merely the audio statement of a decedent, which inherently tends to arouse jurors' sympathies; it also addresses an inflammatory and graphic topic. Without more, the images summoned by a person describing herself as swallowing "puke" are graphic and upsetting. The jury is likely to be inflamed by these images and to attribute the negative connotation to Mr. Ray. The jury is more likely, in other words, to render a decision on "an improper basis, such as emotion, sympathy, or horror." *Shotwell v. Donahoe*, 207 Ariz. 287, 296 (2004) (en banc) (internal quotation marks omitted). This is precisely the type of harm Rule 403 was designed to protect against. *Id.*

2. The prejudice cannot be cured through a limiting instruction because the prejudice is inherent in the purpose for which the State seeks to introduce the recording.

The prejudice arising from a statement that is technically not hearsay cannot always be sufficiently mitigated by a limiting instruction under Arizona Rule of Evidence 105. *Cf., e.g.*,

United States v. Forrester, 60 F.3d 52, 61-62 (2d Cir. 1995) (federal agent's statement regarding ringleader's activities, although technically not hearsay, was inadmissible under Rule 403; declarant did not testify and was not available for cross-examination, and limiting instruction would not have been effective). Here, the allegedly proper purpose for which the State offers the evidence *is* a source of prejudice: The notion that Ms. Brown was "conditioned" by Mr. Ray to put herself in harm's way, and that Mr. Ray "knew" that Ms. Brown would behave in such a way, is the very inference (inflammatory and untested) that threatens Mr. Ray's defense. Jurors cannot reasonably be expected to set aside their reaction to and sympathy for the physical condition of the decedent, even though not related to her death.

III. CONCLUSION

Because Ms. Brown's recorded statement is irrelevant to the charged crimes, and because its prejudicial effect would substantially outweigh any probative value it provided, this Court should exclude Exhibit 735. Nothing that Ms. Brown stated could possibly have put Mr. Ray or anyone else in the room on notice of a mental state that would lead to her untimely death on October 8.

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